

HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

BRENDA TAYLOR, individual, and as executor of
the Estate of Che Andre Taylor; JOYCE TAYLOR,
individually; CHE ANDRE TAYLOR, JR.,
individually; and SARAH SETTLES on behalf of
her minor child, CMT,

Plaintiffs,

v.

CITY OF SEATTLE; MICHAEL SPAULDKING
AND "JANE DOE" SPAULDING, and their martial
community composed thereof; SCOTT MILLER
and "JANE DOE" MILLER: and their martial
community composed thereof; TIMOTHY
BARNES and "JANE DOE" BARNES, and their
martial community composed thereof; and AUDI
ACUESTA and "JANE DOE" ACUESTA, and their
community composed thereof,

Defendants.

No. 2:18-cv-00262-TSZ

**PLAINTIFF'S RESPONSE TO
DEFENDANTS' PARTIAL MOTION TO
DISMISS UNDER 12(B)(6)**

ORAL ARGUMENT REQUESTED

COMES NOW BRENDA TAYLOR, individual, and as executor of the Estate of Che Andre
Taylor; JOYCE TAYLOR, individually; CHE ANDRE TAYLOR, JR., individually; and SARAH
SETTLES on behalf of her minor child, CMT, ("Plaintiffs"), by and through their attorneys and
responds to the Defendants Partial Motion to Dismiss as follows:

Plaintiff's Response to Defendant's Partial
Motion to Dismiss Under 12(b)(6)

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LEGAL ANALYSIS AND AUTHORITY

In seeking dismissal for failure to state a viable claim, a defendant thus bears the “very high burden” of showing that the plaintiff cannot conceivably prove any set of facts that would entitle him to relief. *See Jackam v. Hospital Corp. of Am. Mideast, Ltd.*, 800 F.2d 1577, 1579 (11th Cir.1986). The rule 12(b)(6) motion addresses itself solely to the question of whether the complaint fails to state a claim and is not designed to correct inartistic pleadings or to force compliance with requirements of Rule 10 as to the force of the pleadings. *Walker Process Equipment Inc., v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 174-75 (1965). For the purpose of a motion to dismiss (1) the complaint is construed in the light most favorable to the plaintiff, (2) its allegations are taken as true, and (3) all reasonable inferences that can be drawn from the pleading are drawn in favor of the pleader. *Swierkiewicz v. Sorema, N.A.* 122 S. Ct. 992 (2002). On a motion to dismiss, a court must look to the essence of each claim and not merely the form in which it is pleaded. *Calcutti v. SBU, Incorporated*, 224 F. Supp. 2d 641 (SDNY 2002).

The Supreme Court has stated:

In appraising the sufficiency of the complaint, we follow of course, the accepted rule that a complaint should not be dismissed for failure to state a claim *unless* it appears beyond doubt that the plaintiff can prove *no* set of facts in support of his claim which would entitle him to relief.

Conley v. Gibson, 355 U.S. 41, 46, 78 S.Ct. 99 (1957).

A claim has plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbol*, 556 U.S. 662, 678 (2000)(quoting *Twobly*, 500 U.S. at 556); *see Flaherty v. Lang*, 199 F.3d 607 (2nd Cir. 1999.) (Reluctance to dismiss applies with greater force when plaintiff alleges civil rights violations). Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals

1 observed, be context-specific task that requires the reviewing court to draw on its judicial experience
 2 and common sense. *Ashcroft v. Iqbol*, 556 U.S. 662 (2000).

3 *Twobly* does not require a court of the motion-to dismiss stage to consider whether the factual
 4 allegations are probably true, the Supreme Court made it clear that a court must take the allegations as
 5 true, no matter how skeptical the court may be. *Twombly*, 550 U.S. at 555.

6 Similarly, it need not appear that the plaintiff can obtain the particular relief prayed for in the
 7 complaint as long as the district judge can ascertain from what has been alleged that some relief may
 8 be granted by the court. *U.S. V. Howell*, 318 F.2d 162 (9th Cir. 1963).

9
 10 If the complaint is ambiguous or does not contain sufficient information to allow a responsive
 11 pleading to be framed; the proper remedy is a motion for a more definite statement under rule 12(e). *Id*
 12 *see also Fed. R. Civ. Pro 12(e)*. Similarly, an attempt to eliminate or strike improper or redundant
 13 matters from the complaint should be made under rule 12(f). *See Fed. R. Civ. Pro. 12(f)*.

14
 15 ***Plaintiffs State A Claim For Negligence Upon Which Relief Can Be Granted As The Conduct Could***
 16 ***Be Intentional for Some Police and Negligence For Other Conduct***

17 Defendants cite numerous cases for their position, and the Plaintiffs want to point out that it
 18 believes that each and every case cited by the Defendants all dealt with the cases at summary judgment
 19 stage, after discovery and depositions were taken, not a motion to dismiss stage.

20 Plaintiffs Amended Complaint is premised on intentional acts of Officers Spaulding and Miller,
 21 which could be deemed negligent and the negligence of Officers Barnes and Acuesta. Plaintiffs
 22 alleged that Officers Spaulding and Miller committed intentional torts and Officer Barnes and Acuesta
 23 acts and omissions were negligent. In the Amended Complaint, the Plaintiffs clearly allege that
 24 officers yelled inconsistent commands at Che Andre Taylor while firearms were pointed at him. Che
 25 Andre Taylor's attempt to comply with these inconsistent commands contributed to his death.
 26

1 Officer's Barnes and Acuesta were two of the officers that were yelling conflicting commands at Che
2 Andre Taylor.

3 Notably, Officer Spaulding and Miller were yelling commands that were inconsistent as well at
4 Mr. Taylor as they were approaching him with guns drawn.

5 Under the set of facts set forth in the complaint, Plaintiffs believe they allege facts that, taken
6 as true, support their claim for negligence. In order to state a cause of action for negligence, it is
7 necessary to allege facts which would warrant a finding that the defendant has committed an
8 unintentional breach of a legal duty, and that such breach was a proximate cause of the harm. *See*
9 *O'Donohue v. Riggs*, 73 Wash. 2d. 814, 440 P.2d 823 (1968)(Plaintiff can establish use of force claim
10 upon showing that someone unintentionally but carelessly used excessive force).
11

12 In Washington, the public duty doctrine defines the four instances under which a governmental
13 entity may be found to owe a statutory or common law duty to a particular member of the public,
14 namely (i) legislative intent, (ii) failure to enforce, (iii) the rescue doctrine, or (iv) a special
15 relationship. *See Cummins v. Lewis County*, 156 Wash.2d 844, 853 & n. 7, 133 P.3d 458 (2006). If one
16 of these four "exceptions" does not apply, then no liability may be imposed for a public officer's
17 negligent conduct, based on the reasoning that a duty was not owed specifically to the individual
18 plaintiff, as opposed to the public in general. *Id.* at 852, 133 P.3d 458. Given that Defendants have yet
19 to Answer the Amended Complaint, and Plaintiffs have yet to take any discovery, it is premature to
20 state that the four instances do not apply to the case at hand.
21

22 Plaintiffs' negligence claims are premised on intentional and negligent actions of all the
23 officers and the complaint sets forth facts upon which the Plaintiffs can obtain relief upon this claim.
24
25
26

Plaintiffs Allege §1983 Claims Against The City Of Seattle and Make a Proper Monell Claim

In *AE ex rel. Hernandez*, 666 F.3d. 631, (9th Cir. 2012), the plaintiff alleged a *Monell* claim against the County of Tulare in its complaint, in which the district held the complaint did not meet Rule 8. The Ninth Circuit Court of Appeals struggled and addressed the conflicts between cases and addressing Rule 8. *Id.* The Court of Appeals held that the district court abused its discretion when it dismissed the Plaintiffs section 1983 claim without leave to amend. *Id.*

Defendants are correct that Plaintiffs are alleging respondent superior based on the officers' actions, in addition, to Monell claims. The City of Seattle may be liable for intentional torts under a theory of *respondent superior* if the employee was acting in the scope and course of employment. *See Kyreacos v. Smith*, 89 Wn.2d 425 (1977).

Moreover, it can be reasonably inferred that the City of Seattle's custom of giving conflicting commands, decedent attempting to comply with the conflicting commands by putting his hands up in the air and then attempting to drop them to the ground, officers shooting decedent thereafter within seconds after approaching decedent meets the threshold for a Monell claim as the policy or custom of giving conflicting commands and shooting and killing an individual within seconds is deficient, it caused great harm to the plaintiffs, and it could be viewed that the policy/custom amounted to deliberate indifference. This Court should deny the City's Motion to dismiss any claims against the City for § 1983 liability.

Plaintiff State A Claim For Violation of the Washington Law Against Discrimination Where Plaintiff Does Meet the Essential Elements Of The Statute

Plaintiffs' Sixth Cause of Action lies under the Washington Law Against Discrimination, RCW 49.60.030 *et seq.* ("WLAD") (Dkt 6, ¶ 5.6). WLAD declares that each person has a right to be free

1 from discrimination based on, among other things, race, creed, color, national origin, and mental
2 disability. Wash. Rev. Code § 49.60.030 (West 2018).

3
4 RCW 49.60.010 provides:

5 "This chapter shall be known as the 'law against discrimination'. It is an exercise of
6 the police power of the state for the protection of the public welfare, health, and
7 peace of the people of this state, and in fulfillment of the provisions of the Constitution
8 of this state concerning civil rights. The legislature hereby finds and declares that
9 practices of discrimination against any of its inhabitants because of race, creed,
10 color, national origin, sex, marital status, age, or the presence of any sensory,
11 mental, or physical handicap are a matter of state concern, that such discrimination
12 threatens not only the rights and proper privileges of its inhabitants but
13 menaces the institutions and foundation of a free democratic state...."

14 RCW 49.60.010.

15 The Court of Appeals liberally construes Washington's law against discrimination to achieve
16 its purpose of eliminating and preventing discrimination. *See Griffith v. Boise Cascade Inc.*, 111
17 Wash. App. 436, 45 P.3d. 589 (2002).

18 In *McKinney v. City of Tukwila*, 103 Wash. App. 391 (2000), white police officers and city
19 [defendants] were not liable on claim asserted under state Law Against Discrimination by African-
20 Americans whose vehicle was detained in park following a report that vehicle's occupants might be
21 connected to armed burglary that had just occurred; ***there was no evidence*** that the officer who
22 requested that the car to be stopped knew its occupants were African-American, and mere fact that
23 white people in park were not detained did not show detention was motivated by race. (Emphasis
24 added)

25 An action for discrimination under RCW 49.60.215 requires a showing that the unequal
26 treatment was motivated by race. *See McKinney v. City of Tukwila, citing Evergreen Sch. Dist. No. 114*
27 *v. Human Rights Comm'n*, 39 Wn. App. 763, 773, 695 P.2d 999 (1985).

1 In this case, there is evidence that officers knew that Che Andre Taylor was African American
 2 as they had him under surveillance. The Officer defendants in this case claim to have been surveilling
 3 Che Andre Taylor and two Caucasian individuals for a significant period of time. There is no
 4 indication that the officers witnessed any violent interactions between Che Andre Taylor and anyone
 5 else on the date in question. Che Andre Taylor was the only individual who was shot and killed, and
 6 the other individuals involved who were white, were not shot or killed. Plaintiffs believe that race was
 7 a motivating factor in the actions the police took against Che Andre Taylor.
 8

9 The Plaintiffs maintain that race played a role relation to how the Seattle Police Department
 10 and its defendant officers interacted with Che Andre Taylor and ultimately killed him. This claim
 11 should be allowed to proceed. Plaintiffs' further note that they have made a federal 1983 claim
 12 involving inequitable treatment based on race that should also be allowed to proceed to trial.
 13

14 ***Plaintiffs State a Claim Against Officers Audi Acuesta and Timothy Barnes***
 15

16 Officers Acuesta and Barnes are identified as Defendants in this case. There are sufficient
 17 allegations against all officers, including Officers Acuesta and Barnes, to give rise to a plausible claim
 18 for relief. There are factual allegations against Acuesta and Barnes, that formed the basis of this case,
 19 in which they drove a vehicle which captured some audio and video portions of this incident. (Dkt. 6,
 20 para. 4.10). In the audio recording, multiple police officers can be heard simultaneously giving Che
 21 Andre Taylor conflicting commands. (Dkt. 6 at para. 4.12). Some officers can be heard yelling at Che
 22 Andre Taylor to put his hands up while other police officers can be heard yelling at him to get on the
 23 ground. (Dkt. 6 at para. 4.13). The police commands to Che Andre Taylor were being yelled at Che
 24 Andre Taylor from multiple directions. (Dkt. 6 at para. 4.14). After shooting Che Andre Taylor,
 25 police officers rolled his body over and handcuffed him. (Dkt. 6 at para. 4.18). Critical minutes lapsed
 26

between the time in which Che Andre Taylor was shot and the time that police officers allowed medical emergency personnel to render aid. (Dkt. 6 at para. 4.20). Che Andre Taylor was ultimately shot and killed while attempting to comply with conflicting police officer commands. (Dkt. 6 at 4.24). These factual allegations give rise to a cause of action against Officer Acuesta and Barnes. Several of the Plaintiffs' causes of action can extend to alleged actions of Officers Acuesta and Barnes. Therefore, the Court should deny the Defendants request to dismiss Officers Acuesta and Barnes.

Plaintiffs Allege a False Arrest Where Mr. Taylor Was Arrested And Where Plaintiffs Also Bring An Unlawful Seizure Claim

Plaintiffs are pleading all three claims, state law claims of false arrest, unlawful seizure, federal claims under § 1983. The three claims may appear duplicative, but each claim is distinct, separate and a different claim. It appears that Defendants concede that Taylor was seized, but are silent on whether he was arrested when officers rolled his body over and handcuffed him. The Court should allow Plaintiff's Third and Fourth Causes of Action as pleaded.

Officers violated Joyce Dorsey Fourteenth Amendment Rights by depriving her of her familial relationship with Che Andre Taylor

The parents and child of a victim of an unlawful police killing have a claim for deprivation of familial relationship under the due process clause of the Fourteenth Amendment. *Wilkinson v. Torres*, 610 F.3d 546, 554 (9th Cir. 2010) (parents). Official conduct that "shocks the conscience" in depriving family members of that relationship is a due process violation. *Wilkinson*, 610 F.3d at 554. Where the circumstances of the conduct are such that "actual deliberation [was] practical, then an officer's 'deliberate indifference' may suffice to shock the conscience." *Id.* "On the other hand, where a law enforcement officer makes a snap judgment because of an escalating situation, his conduct may

1 only be found to shock the conscience if he acts with a purpose to harm unrelated to legitimate law
2 enforcement objectives.” *Id.*

3 Where § 1983 does not provide suitable remedies for constitutional violations, the federal
4 courts are instructed to turn to state law “so far as the same is not inconsistent with the Constitution
5 and laws of the United States.” 42 U.S.C. § 1988(a).

6 In *Robertson v. Wegmann*, 436 U.S. 584, 594 98 S. Ct. 1991, 56 L.Ed.2d 554 (1978), the
7 Supreme Court held that state law on survivorship of causes of action should control so long as that
8 state law is not generally “inhospitable to survival of § 1983 actions...[and] has no adverse effect on
9 the policies underlying § 1983.” The Supreme Court, however, has still not resolved the issue of
10 whether wrongful death cause of action may be pursued under § 1983. Nevertheless “[c]onfronted
11 with standing problems, federal courts have ‘borrowed’ the wrongful death remedy as well as the
12 survival remedy from state statutes under the vehicle of 42 U.S.C. § 1988, declining to apply state
13 limitations on recovery if necessary to fairly compensate victims of constitutional deprivations and to
14 deter police misconduct.” *Davis v. City of Ellensburg*, 651 F.Supp. 1248, 1253 (E.D. Wash. 1987),
15 (Court holding that the wrongful death action brought on behalf of the decedent’s parents was not
16 barred, and any limitations imposed by the statute are inconsistent with the purposes of § 1983. The
17 goals of deterrence, compensation and federal supremacy require that defendants’ motion to dismiss,
18 and for summary judgment, on the basis of lack of standing under the state wrongful statute must be
19 denied); citing *Brazier v. Cherry*, 293 F.2d 401 (5th Cir. 1961), and *Bell v. City of Milwaukee*, 746 F.2d
20 1205, 1238 (7th Cir. 1984).

21
22
23 Therefore, this Court should allow Joyce Dorsey to proceed with her Fourteenth Amendment
24 claims and borrow Washington State Law Survival and Wrongful Death Statutes.
25
26

Plaintiffs May Bring § 1983 Claims Under The Fourth and Fourteenth Amendment

For the reasons set forth above, some Plaintiffs are allowed to bring a § 1983 claims on behalf of Joyce Dorsey. Additionally, the Estate also has standing to bring its own claim under § 1983. The Plaintiffs believe all claims by the Plaintiffs should survive.

Plaintiffs Cause of Action for the Torts of Outrage and Assault

Defendant Officer's Spaulding and Miller shot Che Andre Taylor several times within seconds of getting out of their unmarked police vehicle. The defendant officers' poorly planned approach of Che Andre Taylor coupled with their inconsistent commands created conditions for Che Andre Taylor's wrongful death. A claim under § 1983 for excessive force fits and meets all the requirements set forth in the torts of outrage and assault. Plaintiffs are willing to stipulate that these claims are tied to the excessive use of force claim.

Only Claims of Use Of Force Should Be Analyzed Solely Through The Lens Of The Fourth Amendment And Other Claims Should Be Analyzed Through Substantive Due Process Claims

Plaintiffs agree that excessive force claims should be analyzed under the Fourth Amendment. However, Plaintiffs are also bringing more additional claims and not solely an excessive force claim. All of the Plaintiffs claims, with the exceptions of the use force claim, should be viewed through substantive due process claims.

Brenda Taylor's Substantive Due Process Claims Under § 1983 Should Be Dismissed

Plaintiffs agree that Brenda Taylor's claim for a substantive due process claim under § 1983 should be dismissed.

CONCLUSION

Plaintiffs' Amended Complaint states claims which are viable. It provides Defendants with notice and the ability to draw the reasonable interference Defendants are liable for the misconduct alleged.

DATED this 17th day of August, 2018.

By /s/ Jesse Valdez
Jesse Valdez, WSBA #35378
VALDEZ LEHMAN, PLLC.
Co-Counsel and Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2018, I caused a true and correct copy of the above to be served to the following in the manner indicated below:

Ghazal Sharifi, WSBA #47750
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/s/ Jesse Valdez
Jesse Valdez